

United States
Court of Appeals
For the Ninth Circuit

EUGENE B. SMITH & CO., Inc.,
a corporation,

Appellant,

vs.

ELOY GIN CORPORATION, a corpora-
tion, and HOME INSURANCE COM-
PANY, a corporation,

Appellees.

Appellant's Reply Brief

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No. 13096

REPLY BRIEF OF APPELLANT

Eloy, in its brief, has raised one point which needs reply. Eloy asserts that appellant was entitled to sue upon the Home policy, although by its terms the loss, if any, was to be adjusted with the named insured and payable to the insured, Eloy. (T. R. 83)

To this there are two answers. First, that as noted in the case of *Richartz vs. Martin*, 252 Wisc. 108, 31. N.W. (2) 158, and the annotation 61 A.L.R. 720 cited by Eloy (Brief 10) the cases hold both ways, and second, the position simply adds up to a plea that appellant failed to take steps to mitigate the damages and not having affirmatively pleaded this (R. T. 23-26) the defense is not available to Eloy.

Federal Rules of Civil Procedure
Rule 8 (c)

25 C.J.S. 780
Section 142

Pittman Construction Co. vs. Ellis 39 Ga. App. 490
147 S.E. 420

McDaniel Brothers vs. Wilson (Tex. Civ. App) 70
S.W. (2) 618

Other points raised by Eloy are covered by our
opening brief.

Respectfully submitted,
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